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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-739

THE BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT, et al.,
Petitioners,

vs.

DELORES CLARK, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners[1] pray that a writ of certiorari issue to review the judgment entered August 21, 1972 by the United States Court of Appeals for the Eighth Circuit.

[1] Petitioners are: The Board of Education of the Little Rock School District, Dr. Bert O. Miller, E. Kearney Dietz, T. E. Patterson, Jim P. Spradley, Dr. George P. Beene, Robert M. McHenry, Jr., and Dr. Douglas Stevens, members thereof; Jim L. Jenkins and Charles A. Brown, in their capacities as former Board members not yet formally dismissed from this suit; Dr. Paul Fair, Superintendent; and Floyd W. Parsons, in his capacity as former superintendent not yet formally dismissed from this suit. Respondents are: Delores Clark, Roosevelt Clark, June Clark, Sharon Clark, infants, by their father and next friend, Roosevelt Clark, and Ethel Lamar Moore, an infant, by her mother and next friend, Mrs. Dazzle Mott Moore.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit entered August 21, 1972 is not yet reported and is set forth in the Appendix hereto. The decision of the United States District Court for the Eastern District of Arkansas, Western Division, rendered June 22, 1972, is not reported and is set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1972 and this petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution requires the Little Rock School District, which has never provided any substantial amount of pupil transportation, to bus elementary school children across the city twice daily for the sole purpose of attempting to eliminate racial imbalance in the elementary schools on the eastern and western perimeters of the City where such imbalance is attributable to the residential concentration of blacks on the east and whites on the west, where the expense of such transportation would significantly impinge on the educational process, where the judicial guidelines for correcting racial imbalance which cannot be relieved by recognized desegregation tools such as pairing contiguous attendance zones, majority to minority transfers and minimal transportation of students are unsettled and unclear, where similar issues are presently pending before this Court in **Keyes v. Denver School Dist. No. 1**, 445 F. 2d 990 (10th Cir. 1971), cert. granted 404 U.S. 1036 (1972) (No. 71-507),

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and notwithstanding the availability of school facilities of equal caliber near the homes of such students?

2. In the event the Little Rock School District must cross-bus elementary age children to eliminate racial imbalance (resulting from housing patterns and population movements) in the City's perimeter schools, whether the district should be permitted to implement the desegregation plan prepared by its professional educators where such plan, as modified by the district court, will result in the achievement of at least a 20% minority enrollment in every elementary school in the district (the district wide percentage of black students in all grades being 42%), and where any alternative achieving a greater degree of racial balance would require additional district-provided transportation, the effects and expense of which would unreasonably impinge on the educational program and unreasonably burden the district's youngest pupils who would be required to travel across the City twice daily to distant schools, notwithstanding the availability of school facilities of equal caliber located near their homes?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

1. Proceedings in the District Court.

In an earlier phase of this school desegregation case, **Clark v. Board of Education**, 449 F.2d 493 (8th Cir. 1971), cert. denied 405 U.S. 936 (1972), the Court of Appeals for the Eighth Circuit approved a district court-ordered plan for desegregation of the secondary schools (grades 6 through 12) of the Little Rock, Arkansas School District,

the goal to be accomplished by the cross-town transportation of "many" (449 F.2d at 496) secondary school students. In connection with the elementary situation, the Court of Appeals remanded the case to the District Court with instructions, *inter alia,*

> "(1) to require the Board of Education to submit a plan for the establishment of a unitary system of elementary schools to the District Court no later than November 1, 1971;"

Thereafter, the school district timely filed a plan which it proposed to implement at the commencement of the 1972-73 school year for the purpose of further integrating the elementary schools housing grades 1-5. The Board of Education has consistently opposed the diversion of funds from education programs for the purpose of financing mandatory transportation of students to achieve racial balance[2] and has consistently endorsed the neighborhood school concept in the assignment of elementary students. Therefore, while presenting the plan to comply with the mandate, the Board did not, and does not now, advocate the implementation of that plan as an educationally or financially desirable method of student assignment. It was submitted for the purpose of meeting constitutional standards as currently construed.

Briefly described, the school district's plan divides the elementary schools into two groups—those located in the central city as one group and those on the eastern and western sections of the city as the other group (the latter group will be hereinafter referred to as "the perimeter schools"). By pairing the attendance zones of five schools in the central city, the enrollment at such schools would be "racially balanced" without requiring students to travel

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[2] Approximately 47% (4,769) of the students in grades one through five are black and approximately 53% (5,277) are white. DX 72-19 and 72-20.

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long distances to their school of assignment, although some transportation would be required (312 students). See DX 72-16. This result would be obtained because of the relatively close proximity of the paired schools.

In accordance with the Court of Appeals directive (449 F.2d at 499) to avoid disturbing student assignments at schools which were already integrated because of integrated housing patterns in the surrounding area, school authorities designated five schools which would not be affected by the 1972-73 plan. The students of the minority race in such schools would constitute at least 20% of the total school enrollment. DX 72-15; 72-21.

In order to desegregate the perimeter schools, school authorities proposed to assign all fifth grade students (except those in the central city) to eight facilities located on the east side of town (where the overwhelming majority of residents are black) where they would attend schools also attended by students in the ungraded primary or 1-3 level. The ungraded primary students would be assigned, on a neighborhood basis, to the school generally closest to their home. Conversely, all fourth grade students would be assigned to eight schools located on the west side of town (where the overwhelming majority of residents are white) where they would attend a school also attended by students in the ungraded primary who would be assigned to the school facility closest to their home.[3] Prior to the court-ordered busing of secondary students, the district had never provided any substantial amount of transportation for its students. However, in its plan, the district agreed

[3] In order to determine the particular school to which a 4th grader in the east or a 5th grader in the west would be assigned, existing attendance areas were paired. For example, the Mitchell attendance area (on the east) was paired with that surrounding the Terry school (on the west). Therefore, a 4th grade student who resides in the Mitchell zone would be assigned to Terry and conversely, a 5th grade student who resides in the Terry zone would be assigned to Mitchell.

to furnish transportation for fourth grade students who reside in the east and would thus be required to travel long distances across the city to their school of assignment in the western section of the city. Likewise fifth grade students who live in the west would be transported to their assigned school located in the eastern section of the city. A total of 1,630 fourth and fifth grade students would be transported. DX 72-19. As a result of this "racial balancing" of grades 4 and 5, each of the 16 perimeter elementary schools would have a minority student enrollment (white in the east, black in the west) of approximately 20%.[4] DX 72-21. Black students would comprise from 29.7% to 53.5% of the fourth and fifth grade students assigned to each school. Court of Appeals Slip Opinion, p. 2.

Following a hearing, District Judge Oren Harris entered an Order and Memorandum Opinion on June 22, 1972 which, *inter alia,* approved the school district's plan for integration of the elementary grades provided that the district modify its plan to provide that no elementary school would have a projected minority student enrollment of less than 20% and provided the district offer a majority-to-minority transfer option. Bus transportation was to be provided to any student residing more than two miles from his school of assignment.

Both sides appealed. The school district urged principally that because the propriety of transporting elemen-

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[4] The only significant deviation from this figure would have been at the Western Hills School located on the western side of Little Rock. This school would have only 9.1% black students because of the small size of the two schools whose attendance areas were paired in this instance (Western Hills and Gillam). However, the District Court's Order directed that the minority enrollment be brought up to 20% at each elementary school, by modification in zone lines, etc. Other schools affected by this portion of the District Court's Order, and the minority enrollment **originally** projected there, are as follows: Carver/Pfeifer (17.7% white); McDermott (17.0% black); Washington (19.7% white); Meadowcliff (19.7% black); Terry (17.8% black). See DX 72-21.

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tary age children long distances to achieve racial balance was at the time under consideration by the President and Congress, because the judicial guidelines for correcting racial imbalance which cannot be alleviated by standard desegregation tools (such as pairing of contiguous attendance zones, alterations of zone lines and minimal additional transportation) remain unclear notwithstanding this Court's opinion in **Swann v. Charlotte-Mecklenberg Board of Education**, 402 U.S. 1 (1971), and because of the impact on the Little Rock School District, its students and patrons, of massive cross-town transportation for racial balance, the district court should not have ordered the implementation in 1972-73 of the plan submitted by the school district under protest. The plaintiffs urged that the degree of integration achieved under the approved plan was inadequate.

Pursuant the Education Amendments Act of 1972, the school district sought from the district court a stay of its Order until all appeals in connection therewith were exhausted. The request for a stay was denied. A copy of that order is included in the Appendix.

2. **The Decision of the Court of Appeals.**

The Court of Appeals affirmed most phases of the District Court decision and ordered implementation of all of the school district's plan except that portion which proposed to assign students in the ungraded primary to the perimeter schools closest to their home. The Court directed the submission before January 1, 1973 of a new plan to integrate those student assignments at the inception of the 1973-74 school year. The rejection of the perimeter school ungraded primary proposal was based on the Court of Appeals conclusions that although each of the perimeter schools would serve a student body having a racial minority of at least 20%, the fact that racial imbalance (caused by housing patterns) persisted in the first three

grades of such schools rendered the proposal unlawful. In rejecting the school district's objections to securing further racial balance by additional cross-town busing of the district's youngest children, the Court of Appeals in effect treated the financial burden of such transportation as irrelevant and asserted that it had not been demonstrated that such transportation would "risk the health of the children . . . or significantly impinge on the educational process." See footnote 5. The Court of Appeals also denied the school district's request (pursuant § 803 of The Education Amendments Act of 1972) for a stay of the orders requiring pupil transportation for racial balance.

REASONS FOR GRANTING THE WRIT

This case involves desegregation of the sixteen elementary schools which are located on the eastern and western perimeters of the City of Little Rock, Arkansas.[5] The enrollments at these schools have been and are characterized by racial imbalance simply because the overwhelming majority of residents who live in the east of Little Rock are black and the overwhelming majority of residents who live in the west are white. This imbalance cannot be corrected by conventional desegregation tools, such as pairing contiguous school zones, majority to minority transfers and minimal additional transportation of students, but can only be alleviated by the implementation of a plan for the cross-busing of elementary age children across the City of Little Rock twice daily, notwithstanding the availability of school facilities of equal caliber located near their homes. Unlike the Charlotte-Mecklenberg School District, the Little Rock District has never, prior to its present court-ordered secondary school desegrega-

[5] See page 5 and footnote 2 of the slip opinion of the Court of Appeals. The integration of the other grades and of the faculty has been deemed constitutionally adequate.

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tion program, provided any substantial amount of pupil transportation at district expense. Nevertheless, in order to comply with the 1971 mandate of the Court of Appeals, **Clark v. Board of Education of Little Rock School District**, 449 F.2d 493 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972) (Clark III), the district submitted a plan to restructure the grade arrangement of the sixteen schools involved, to combine non-contiguous attendance zones for grades 4 and 5 and to transport fourth graders to the western schools and fifth graders to the eastern schools, thereby achieving a substantial minority enrollment in those grades in each of the schools.

The district objected to implementation of the plan it was ordered to submit, pointing out that the annual expense of transporting only the fourth and fifth graders (and none of the ungraded primary students who live in the perimeter areas of Little Rock) would be approximately $171,260.00 (for 1,942 students) which, when added to the transportation expense involved in the continuation of the secondary school desegregation plan, would mean that the district, never before having expended any remotely comparable sum for busing, would in future years be spending $634,895.00 annually for busing to achieve racial balance.[6] DX 72-25. That sum could only be obtained by diverting monies previously allocated to such needed and educationally desirable items as instructional supplies and equipment, library resources, building upkeep and alteration, administrative office equipment and, by the elimination of teaching positions and personnel. DX 72-26 and Tr. 131-150. The effect of that diversion on the district's educational program would be devastating. The proof further demonstrated that if ungraded primary students were required to be transported across town

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[6] Testimony at the hearing indicated that of that amount, the district can reasonably expect to receive only 40%, and perhaps less, reimbursement from state funds. Tr. 142.

pursuant a plan tendered by plaintiffs, the anticipated additional expense would be approximately $242,060.00 and that the effect of that additional expenditure would be correspondingly more detrimental to the educational program. DX 72-26.

Nevertheless, the Court of Appeals directed that racial balance be achieved within each grade level in each of the sixteen schools. The opinion stated:

> "We cannot approve the plan . . . insofar as it provides that approximately four thousand students in grades 1 through 3 living in the segregated neighborhoods of eastern and western Little Rock will continue to attend segregated classes during these important primary grades." Slip Opinion, p. 2.

It was ordered:

> "4) That the school board submit to the district court, before January 1, 1973, a detailed plan applicable to those students which requires their attendance at desegregated classes in a desegregated school. The board is directed to make the assignment of pupils at schools in a manner similar to that utilized in desegregating the classes and schools for students living in the eastern or western sections of Little Rock and attending grades 4 or 5. Transportation shall be furnished to those students in accordance with the criteria previously established by the district court." Slip Opinion, p. 4.

The school district's proposal was thus rejected notwithstanding the fact that implementation of that plan would result in the racial minority (whether white or black) enrolled at any particular school in the district being at least 20% of the total school enrollment.[7] The

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[7] A similar plan had previously been approved by the Eighth Circuit in **Yarbrough v. Hulbert-West Memphis School District**, 457 F.2d 333 (8th Cir. 1972) (requiring a minority enrollment of 30% in each school).

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plan was rejected for the reason that the 20% racial minority would be concentrated in only one of the four grades being served at the perimeter schools with the racial composition of the other three grades generally reflecting the racial residential patterns in the area surrounding the particular school.

This case was decided in the midst of a growing, nationwide controversy centering upon the feasibility, propriety and legality of court-ordered compulsory transportation of young children for the purpose of eliminating racial imbalance in the schools of the nation. That issue was of course first considered by this Court in **Swann v. Charlotte-Mecklenberg Board of Education**, 402 U. S. 1 (1971) and its companion cases. **Swann** held, in essence, that "busing" is a permissible device for the conversion to a unitary school system, but that it was not a panacea. This Court stated that once a constitutional violation (a disproportionate racial concentration attributable to past or present discriminatory action of school authorities) has been found, the school district's obligation is to use all "reasonable, feasible and workable" techniques to correct the condition which offends the Constitution. See 402 U.S. 1, 31. **Swann** did indeed sanction the district judge's Charlotte-Mecklenberg order which required the massive use of district-provided pupil transportation. However, it was emphasized that such drastic measures were not universally appropriate and that the transportation which was sanctioned in the school district before it was well within the latter's capabilities. With specific reference to transportation, this Court said: ". . . implementation of the decree is well within the capacity of the school authorities." 402 U.S. 1, 30. After observing that the Charlotte District had previously transported 23,000 students for purposes unrelated to desegregation, the Court noted that the proposed system ". . . compares favorably with the transportation plan previously operated in Charlotte

. . . ." N. 11, 402 U.S. 1, 29. The additional buses required by the proposed system ". . . could be easily obtained." N. 12, 402 U.S. 1, 30. Finally, the **Swann** opinion observes that North Carolina law **requires** district-provided transportation for all students more than 1½ miles from their assigned school. *Ibid.*

Swann also explicitly recognized circumstances in which the use of busing could involve such disruptive effects that it should not be resorted to. At 402 U.S. 1, 30, it was stated:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students."

Thus, **Swann** dealt with a school district which had long been engaged in a massive program of pupil transportation and which could financially and logistically make suitable arrangements for the provision of the transportation which the district court had ordered it to undertake. Insofar as the issue of required pupil transportation is concerned, that case bears absolutely no resemblance to the situation of the Little Rock School District, nor to other districts which have historically not provided pupil transportation at district expense.

The controversy previously mentioned is, we submit, occasioned by the continuing insistence of many lower federal courts that **Swann** requires mandatory busing regardless of the consequences. Commenting on the frequent misreading and misapplication of **Swann**, the Court of Appeals for the Sixth Circuit recently said:

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"There seems to have grown up across the land an idea by most United States District Judges that extensive busing must be ordered to obey the commands of **Brown I** and **II**. They turn to **Swann** for their authority. **Swann** did not decide anything of the kind. In the case before us, as was true in other decisions, this Court had approved the conduct of various Boards of Education who made an honest effort to establish a unitary system. If now every order involving schools requires busing, the question may well be asked, 'What next?'"

See also **Goss v. Board of Education of Knoxville**, 444 F.2d 632 (6th Cir. 1971); **Northcross v. Board of Education of Memphis**, 444 F.2d 1179 (6th Cir. 1971); and see the opinion of the Chief Justice (as Circuit Justice) in **Winston-Salem/Forsythe County Board of Education**, No. 712-274, Oct. Term 1971. The implications of the current dilemma are eloquently stated in one of the **seven** opinions rendered in **United States v. Texas Education Agency**, ... F.2d ... (5th Cir., No. 71-2508, August 2, 1972) (fourteen judges sitting en banc). Judge Godbold, joined by six other judges of the court, observed:

"The highest standards of judicial administration demand that pending further action by the Supreme Court of the United States this appeal be held in abeyance without reaching the merits. The wisdom of such a course is demonstrated by the divisions among the members of our court in this case. Of the fourteen judges participating, seven are of the view that at this time our decision should be to make no decision on the merits. The court proceeds to a merits decision, not because a majority approve of that action but on the parliamentary ground that since the proposed decision of not reaching the merits at this time commands the vote of only one half of those participating, consideration of the merits is

required. On the merits a majority agree only on the result and a statement of remedy. Slip opinion p. 87.

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"Our country is sharply divided over aspects of school desegregation, particularly the assignment of pupils to schools and the consequent necessity in some instances of transporting students who otherwise would not be transported. The problem of school segregation is national in scope. The efforts to disestablish segregated schools have had repercussions far beyond the original confines of the problem and into broader issues such as flight from urban areas, the decay of our cities, and the ability of our governmental structures to survive the overall economic consequences.

The validity of the de facto-de jure dichotomy, and its interplay with the necessity of state action, remain unanswered. Until the Supreme Court provides a definite answer we do not know what we should do about segregation springing from causes other than affirmative state action. Among both judges and commentators there are numerous opinions, and shadings of opinion, as to the meaning of **Swann.** Id. at 87-88.

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"In short, in the present state of the law, it is virtually impossible for this court to render decisions in complex student assignment cases with confidence in the correctness of what we do. In like manner, in many situations school boards, their attorneys, and district judges are without rudder or compass. Yet the remedies which we judges are asked to provide in difficult pupil assignment cases will have massive impact upon the lives, the families, and the future of millions of people, and tremendous economic and sociological impact upon their communi-

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ties. Some of those consequences will be wholly irreversible.

Therefore, until the Supreme Court can go to the heart of this grave national issue and give us the guidance essential to the performance of our duties, we should hold in abeyance all those pupil assignment cases which cannot be solved by well recognized tools whose validity is beyond question, such as pairing contiguous schools, majority to minority transfers, and minimal additional transportation of students. Some of the issues presented in this appeal and in numerous other cases pending before us are common to **Keyes v. Denver School District No. 1,** 445 F. 2d 990 (10th Cir., 1971), **cert. granted,** 404 U. S. 1036, 30 L.Ed. 2d 228 (1972) (No. 71-507) . . . Id. at 88-89.

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"Our view is not the consequence of action either taken or proposed by the executive and legislative branches of our government. Stated simply, as judicial officers we need additional judicial guidance before we undertake measures which will so deeply and so irreversibly affect the fabric of our country and its people and its communities." Id. at 90.

The inconsistency of the various approaches taken by the lower federal courts was one of the chief factors motivating the efforts of the President to find a solution. In his March 17, 1972 message to Congress, the President explained the rationale of his proposed moratorium on student transportation for desegregation as follows:

"It has become abundantly clear, from the debates in the Congress and from the upwelling of sentiment throughout the country, that some action will be taken to limit the scope of busing orders. It is in the interest of everyone—black and white, children and parents, school administrators and local officials, the courts, the Congress and the executive branch, and

not least in the interest of consistency in federal policy—that while this matter is being considered by the Congress we not speed further along a course that is likely to be changed."

The diverse, inconsistent and often ill-advised resolution of many important school desegregation issues is wreaking havoc with this nation's public educational system. See, e.g., **Lee v. Macon County Board of Education,** ... F.2d ... (5th Cir., No. 71-2902, August 14, 1972), where the Fifth Circuit held that **Swann** required implementation of a "desegregation" plan ". . . with the full realization that it would result in the student body of the system in all probability being composed only of Negro students." Slip Opinion, p. 2. A similar fate may well await many other school districts in this Country. See **Calhoun v. Cook,** ... F.2d ... (5th Cir., No. 72-2453, October 6, 1972), and 332 F. Supp. 804 (N.D. Ga. 1971) (involving the Atlanta, Georgia schools). In 1965, blacks comprised 31% of the Little Rock District's pupils. **Clark v. Board of Education,** 369 F.2d 661, 666 (8th Cir. 1966). At the time of the hearing in 1972, blacks comprised 42% of the total pupil population and, student enrollment in the first grade is predominantly black for the first time in the history of the district. Tr. 90, DX 72-103.

Courts have divided as to whether the previously espoused "de facto-de jure" distinction is a viable doctrine[8] and if it is whether the existence of de jure segregation requires racial balancing of all schools in the district or only those directly affected by the de jure actions.[9]

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[8] Compare **Cisneros v. Corpus Christi Ind. Sch. Dist.,** ... F.2d ... (5th Cir., No. 71-2397, August 2, 1972) (discarding the doctrine) with **United States v. Board of Education,** 459 F.2d 720 (10th Cir. 1972) (applying the doctrine in the Tulsa, Okla. school case) and **Keyes v. Denver School Dist. No. 1,** *supra.*

[9] Compare **United States v. Board of Education,** and **Keyes,** *supra,* N. .... with **Guinn v. Kelley,** 456 F.2d 100 (9th Cir. 1972) (Las Vegas school district).

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Also while some courts recognize that the financial burden of desegregation busing should be a legitimate consideration and that in some cases the exhorbitant expense can constitute an unwarranted impingement on educational programs, other courts seemingly deem such expense an irrelevancy. Compare **Mapp v. Board of Education**, *supra*, Slip Opinion p. 11, and **Brewer v. School Board of Norfolk**, 456 F.2d 943, Note 6 at 947 (4th Cir. 1972), with Note 5 of the Eighth Circuit's opinion in this case where it is stated: "The defendant (the Little Rock School District) has stressed the cost of this transportation. We think it clear, however, that equal educational opportunity must be provided despite cost and inconvenience."

The issues in this case include the de facto-de jure distinction,[10] the weight to be given to the expense factor in school busing cases, the concept of racial identifiability,[11] the phenonema of abandonment of the public school system by patrons moving to suburbs or enrolling their children in private schools, and the effects of twice daily, cross-town transportation of the youngest school children to enhance racial balance.

The need for clarification of the governing principles is evident. There are presently pending in this Court numerous petitions for certiorari to review opinions in school desegregation cases, and argument has been held in **Keyes v. Denver School District No. 1**, 445 F.2d 990 (10th Cir.

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[10] In prior phases of this case, District Judge Henley characterized housing patterns in Little Rock as "de facto segregated," 328 F.Supp. 1205, 1208 and the late District Judge Gordon E. Young who presided at the 1968 trial of this case held in his opinion filed May 8, 1969: "We have no doubt that the growth of Little Rock and its School District would have been the same without regard to so-called de facto or de jure segregation."

[11] Is an elementary school racially identifiable where 20% of the students are a minority race in that school, and where faculty and staff are racially balanced?

1971), cert. granted 4040 U.S. 1036 (1972) (No. 71-507). The granting of the writ in this case would afford the Court a broader perspective in its approach to the school desegregation cases now before it for the purpose of settling the many complex and extremely important issues which have arisen subsequent to **Swann** respecting the mandatory provision of district-provided pupil transportation at the elementary level in cases where the school district has never provided any significant amount of pupil transportation, where the school district has racially balanced the schools in its central city area and has achieved a 20% minority enrollment in every other elementary school of the district and by adopting and utilizing most or all of the traditionally employed desegregation devices and where the district can alleviate remaining racial imbalance only by resorting to massive pupil transportation plans involving tremendous expense and detriment to the educational program.

CONCLUSION

For the foregoing reasons it is submitted that a writ of certiorari should issue to review the opinion and judgment entered August 21, 1972 by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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November 16, 1972.

APPENDIX

APPENDIX I

OPINION

United States Court of Appeals
for the Eighth Circuit

No. 72-1406
No. 72-1407
No. 72-1438

Delores Clark, et al.,
Plaintiffs-Appellants,
v.
The Board of Education of the Little Rock School District et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: August 7, 1972

Filed: August 21, 1972

Before Heaney, Bright and Ross, Circuit Judges.

Per Curiam.

We are asked for the eighth time to review a district court decree purporting to establish a unitary school system in Little Rock, Arkansas.[1] This time the principal

[1] A history of the prior litigation may be found in **Clark v. Board of Education of Little Rock School Dist.**, 426 F.2d 1035, 1037 n. 1 (8th Cir. 1970), **cert. denied**, 402 U.S. 952 (1971).

question is whether the plan approved by the district court for desegregating elementary grades 1 through 5 meets constitutional standards.[2] We find the plan satisfactory as to grades 4 and 5, unsatisfactory in part as to grades 1 through 3.

I

Desegregation of the Elementary Grades

The plan approved by the district court would:

1) Desegregate grades 4 and 5 by zoning, clustering, and pairing. In substance, students living in the relatively integrated neighborhoods of central Little Rock would attend schools in their own neighborhoods. Fourth grade children living in the predominantly white, western section of the city and those living in the predominantly black, eastern section would attend desegregated classes in the western section of the city. Fifth grade students living in both these sections would attend desegregated classes in the eastern section. Black students would comprise from 29.7 to 53.5 percent of the 4th or 5th grade students assigned to each school.[3]

2) Desegregate grades 1 through 3 in the central section of the city by assigning children to schools in their own neighborhoods.

3) Purport to desegregate grades 1 through 3 in the western and eastern sections by assigning students in these

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[2] It is undisputed that grades 6 through 12 are now desegregated in accord with prior decisions.

[3] The western elementary school buildings which will house grade 4 are McDermott, Terry, Jefferson, Williams, Brady, Wilson, Western Hills, and Meadowcliff. Those eastern elementary school buildings which will house grade 5 are Carver, Gibbs, Rightsell, Washington, Gillam, Granite Mountain, Ish, and Mitchell.

grades to schools in their own neighborhoods. Classes in these first three grades in the western section would be nearly all white and in the eastern section nearly all black.[4]

4) Require the school board to provide free transportation for all students living more than two miles from the school to which they are assigned.[5]

We approve the district court's plan insofar as it provides for the integregation of grades 1 through 5 in the central section of the city. We do so because this aspect of the plan preserves the neighborhood school in relatively

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[4] The following table indicates the proportion of black students that would be enrolled in grades 1 through 3 in the eastern and western sections of Little Rock under the plan suggested by the school board, which was adopted with some modifications by the district court:

	School	Percentage Black
A.	**Eastern**	
	Carver-Pfeifer	99.8
	Gibbs	93
	Rightsell	100
	Washington	100
	Gillam	100
	Granite Mountain	100
	Ish	95
	Mitchell	96.5
B.	**Western**	
	McDermott	0
	Williams	0
	Brady	12.5
	Jefferson	0
	Western Hills	0
	Meadowcliff	0
	Terry	0
	Wilson	5.1

[5] The defendant has stressed the cost of this transportation. We think it clear, however, that "[e]qual educational opportunity must be provided despite cost and inconvenience." **United States v. Tex. Edu. Agcy.**, ... F.2d ..., ... (5th Cir., No. 71-2508, Aug. 2, 1972, slip opinion at 53). The school board has not demonstrated that transportation between the eastern and

integrated neighborhoods,[6] and there is nothing to suggest that students in these grades will not be placed in fully desegregated classrooms and school buildings.

We cannot approve the plan, however, insofar as it provides that approximately four thousand students in grades 1 through 3 living in the segregated neighborhoods of eastern and western Little Rock will continue to attend segregated classes during these important primary grades.[7]

It is argued that the plan for grades 1 through 3 in the eastern and western sections should be approved because students attending the segregated classes in these grades will be doing so in school buildings that will house integrated 4th and 5th grades. This argument is without merit. **See Jackson v. Marvell School District No. 22**, 425 F.2d 211 (8th Cir. 1970). **Cf. Moses v. Washington Par. Sch. Bd.**, ... F.2d ... (5th Cir., No. 71-2561, Mar. 8, 1972), **petition for cert. filed**, 41 U.S.L.W. 3056 (U.S., July 18,

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western sections of Little Rock would either risk the health of the children in the primary grades or significantly impinge on the educational process. **See Swann v. Board of Education**, 402 U.S. 1, 30-31 (1971). In **Swann**, the Supreme Court approved a desegregation plan which included provisions for transportation of elementary students in grades 1 through 4 for as long as thirty-five minutes. The record in the present case indicates that transportation time would be similar, thirty to forty-five minutes. Moreover, this time factor is the same as in the plan which the school board adopted and the district court approved for those students requiring transportation in grades 4 and 5.

[6] **See Clark v. Board of Education of Little Rock School Dist.**, 449 F.2d 493, 499 (8th Cir. 1971), **cert. denied**, 402 U.S. 952 (1971).

[7] **In Brown v. Board of Education**, 347 U.S. 483, 494 (1954), the Supreme Court stated that segregation is particularly damaging to children in grade school and high school because it generates a feeling of inferiority "that may affect their hearts and

1972, No. 72-41). It flies in the face of the clear mandate of **Clark v. Board of Education of Little Rock School Dist.**, 449 F.2d 493 (8th Cir. 1971), **cert. denied**, 405 U.S. 936 (1972) (**Clark 1971**), which requires the desegregation process to apply fully to all elementary grades. The argument appears to be a last ditch effort to retain a segregated school system in the primary grades contrary to the Supreme Court's mandate that segregation be eliminated "root and branch." **Green v. County School Board**, 391 U.S. 430, 437-38 (1968). **Cf. United States v. Tex. Edu. Agcy.**, ... F.2d ... (5th Cir., No. 71-2508, Aug. 2, 1972).

Under these circumstances, we have no alternative but to remand this matter once more to the district court. In doing so, we Order:

1) That the district court's plan for the 4th and 5th grades be implemented at the beginning of the 1972-73 school year.

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minds in a way unlikely ever to be undone." The Court observed:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

If Little Rock's children have an opportunity for an integrated education in the primary grades, then they will be better prepared to compete effectively in the already desegregated higher grades. **See Johnson v. San Francisco Unified School District**, 339 F. Supp. 1315, 1332 (N.D. Cal. 1971); **Swann v. Board of Education**, 318 F. Supp. 786, 798 (1970); Schoettle, **The Equal Protection Clause in Public Education**, 71 Col. L. Rev. 1355 (1971).

2) That the district court's plan for grades 1 through 3 in the central section of the city be implemented at the beginning of the 1972-73 school year.

3) That the school board's proposal relating to students attending the first three grades in the eastern and western sections of the city be disapproved for failure to meet constitutional standards.

4) That the school board submit to the district court, before January 1, 1973, a detailed plan applicable to these students which requires their attendance at desegregated classes in a desegregated school. The board is directed to make the assignment of pupils to schools in a manner similar to that utilized in desegregating the classes and schools for students living in the eastern or western sections of Little Rock and attending grades 4 or 5. Transportation shall be furnished to these students in accordance with the criteria previously established by the district court.

5) That the district court hold hearings on the detailed plan at the earliest possible date and issue its decision promptly so that any possible appeal can be taken in sufficient time to implement the plan at the beginning of the 1973-74 school year. The present plan for assignment of pupils of these first three grades in the eastern and western sections of Little Rock, as approved by the district court, of necessity will apply until the beginning of the 1973-74 school year.

We recognize that our order is quite specific, but it needs to be. We had requested the school board to produce a plan for these grades a year ago. It failed to meet that responsibility. That failure was just one in a series. The plaintiffs-appellants had suggested a different plan for desegregating the elementary grades. The district court did not accept that plan. We advise, however, that if the parties themselves can come to an agreement on an

alternative plan for students attending the elementary grades, such plan will be acceptable if it meets the criteria set forth in **Clark 1971**, *supra*, 449 F.2d 493, and in this case, and receives the approval of the district court.

The additional year's delay in integrating some of the primary grades is regrettable but we feel that fairness to the children requires that the parties be given an opportunity to work out the practical details for implementing the plan that we have suggested, or to develop an alternative plan. This appeal reached us too late for the parties to have such an opportunity before the beginning of the present school year.

II

Assignment of Teachers

The school board in a cross-appeal asks us to reverse that part of the district court's order requiring the majority of the teachers in each elementary school to be of the race (black or white) different from that of the majority of the students.

Appellants do not resist this request but concede that this aspect of the district court's order "does not serve any useful purpose * * *." The appellants in their own appeal relating to teacher assignments assert that the school board has failed to promulgate any proper standards for reassignment of teachers in connection with efforts to desegregate the faculty in the elementary schools.

We consider each of these issues.

A

The record shows that the faculty of the Little Rock School District consists of 70 percent white and 30 percent black teachers. Appellee school board notes in its brief that it is committed to providing a desegregated faculty which is no less than 18 percent nor more than 45 percent black at each school in Little Rock.

Since the appellants do not dispute the constitutional validity of this aspect of the school board's plan, which seeks to assign black and white teachers to each school in a manner substantially proportionate to the ratio of black to white teachers in the school system as a whole,[8] we believe the district court's modification of the board's plan to be inappropriate and set aside that part of the court's order which requires assignment of faculty so that "elementary schools with a greater number of students of one race will have teachers of a greater number of the other race for that particular school."

B

We comment briefly upon plaintiffs' assertion that the school district has promulgated vague and uncertain standards for reassigning individual faculty members. The school board's action concerning employment, retention, assignment, and discharge of teachers is governed in part by provisions of an agreement with the Classroom Teachers' Association. This agreement provides for objective as well as subjective guidelines for evaluating a teacher's quality and performance. In the area of assignment of teachers within a school or reassignment of teachers from one school to another, the personal preference of an individual teacher appears to carry substantial weight. The agreement sets out no standard accommodating this preference with constitutional requirements for a desegregated faculty at each school. Appellants argue that these faculty reassignment criteria are "vague and uncertain * * * do not contain enlightenment as to weight accorded each; nor * * * when they apply and how they may be implemented." [Appellants' Brief at 15].

We agree that these regulations governing assignment and reassignment provide no clear guidelines for achiev-

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[8] **See Singleton v. Jackson Municipal Separate School Dist.**, 419 F.2d 1211, 1217-18 (5th Cir.), **cert. denied**, 396 U.S. 1032 (1970).

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ing a desegregated faculty in each school on a fair and nonracial discriminatory base. However, no adequate record has been developed demonstrating particular constitutional inadequacies in the regulations.

We think it premature for us either to approve or to disapprove these standards in these proceedings and upon the present record. For the present, we believe this matter is one that should be subject to further study and review of the board as it proceeds with the disestablishment of the dual system in the Little Rock School District. Should appellants have specific constitutional objections to the nature or effect of the criteria used in the assignment or transfer of teachers within the school system, and suggestions for remedying such deficiencies, they may present such matters to the district court for its consideration at an appropriate time.

III

Request for Stay

Appellant school board requests a stay of implementation of any order in these proceedings which requires "crosstown busing of elementary students." [Appellants' Brief at 24].[9] The school board argues that such a stay is required by § 803 of the Education Amendments of 1972, Pub. L. No. 92-318 (June 23, 1972). That section reads:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, re-

[9] The school board similarly applied to the district court for a stay, pending appeal, of its order of June 22, 1972, relating to transportation of students in grades 4 and 5. The district court, on July 25, 1972, denied this request.

> ligion, or socio-economic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

The explicit language pertinent here refers to a court order "which requires the transfer or transportation of any student * * * from any school attendance area prescribed by competent local authority * * *." This section specifically does not require us to delay desegregation of grades 4 and 5. The attendance zones for students in these grades have been prescribed by the school board. The order of the district court now appealed approved the school board's proposal.

While the school board had developed its plan[10] in compliance with the mandate of this Court in **Clark 1971**,[11] it also had proceeded to exhaust all avenues of appellate review of that mandate. The Supreme Court denied the board's application for certiorari on February 22, 1972.

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[10] The school board states in its brief that while it did not or does not advocate the implemention of its plan as an educationally or financially desirable method of student assignment, the board had submitted this plan "for the purpose of meeting constitutional standards as currently construed" [Brief for Appellees at 2].

[11] In our opinion in that case, we said in part:

> We remand this matter to the District Court with instructions: (1) to require the Board of Education to submit a plan for the establishment of a unitary system of elementary schools to the District Court no later than November 1, 1971; (2) to require the Board of Education to implement the plan to the extent possible during the current school year and to fully implement the plan no later than the beginning of the 1972-73 school year; * * * (5) to require the Board of Education to take immediate steps to arrange for the transportation necessary under the plan and to make application for such state or federal funds as may be available for such purposes * * * [449 F.2d at 499]

Board of Education of Little Rock School District v. Clark, 405 U.S. 936 (1972).

Since the transfer of students to grades 4 and 5 in the eastern and western sections of Little Rock comes about through a proposal of the school board, approved by the federal courts, such transfer falls outside those court orders reached through § 803. Accordingly, we deny any stay of implementation of these particular desegregation procedures.

We think it obvious that § 803 cannot apply to the present mandate to be issued in this case by this court, which will require the desegregation of the first three grades in primary schools located in the eastern and western sections of Little Rock. This part of the mandate will not require full implementaiton until the beginning of the 1973-74 school year. Thus, even if the term "all appeals," as used in § 803, should be construed to include an application to the Supreme Court for a grant of certiorari, the board will have ample time to test our action in the Supreme Court.[12]

We affirm in part, reverse in part, and remand this case to the district court for further proceedings in conformity with this opinion. Our mandate shall issue without delay.

Costs shall be taxed against the school board, and appellants are allowed counsel fees on this appeal of $1,000.

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[12] The parties have submitted no briefs directed to the interpretation and construction of § 803. We limit our comments to the applicability of that section to the precise circumstances presented by this appeal. We make no judgment as to the constitutionality of this section.

APPENDIX II

In the United States District Court
Eastern District of Arkansas
Eastern Division

Delores Clark, et al.,
Plaintiffs,

v.

The Board of Education of the Little Rock School District, et al.,
Defendants.

No. LR-64-C-155

ORDER

(Filed June 22, 1972)

Pursuant to the Memorandum Opinion entered this day, and from the record of this proceeding at the hearing, testimony of witnesses, exhibits, and briefs of counsel for the parties, it is the opinion of the Court the proposed plan of desegregation for the elementary schools of the Little Rock School District with modifications as being required by the Court, and the plan proposed by the district for the employment, assignment and dismissal of teacher personnel as modified by the Court to be applicable to clerical and other staff members of the school district should be approved.

It Is, Therefore, Considered, Ordered and Adjudged that the plan proposed by the Board of Education of the Little Rock School District for desegregation of the elementary schools within the district as modified by the Court be and the same is hereby approved.

It Is Further Ordered that the proposed plan of the school district for the employment, assignment and dismissal of faculty and other staff members as modified by the Court be and the same is hereby approved.

Dated: June 21, 1972.

OREN HARRIS
United States District Judge

APPENDIX III

In the United States District Court
Eastern District of Arkansas
Western Division

Delores Clark, et al.,
Plaintiffs,
v.
The Board of Education of the Little Rock School District, et al.,
Defendants.
No. LR-64-C-155

MEMORANDUM OPINION

(Filed June 22, 1972)

This Court is again under a mandate to require the Board of Education of the Little Rock School District to develop and submit an acceptable plan that would meet constitutional standards for a racially nondiscriminatory system in the operation of its schools. The time has long passed for the school board to comply with the plain mandate of the Supreme Court of the United States and the United States Court of Appeals for the Eighth Circuit to fully and completely desegregate the district's schools in every facet of its operation which previously had operated a school system established under compulsion of state laws. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about. School boards such as this school district operating state-compelled dual systems are charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in

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which racial discrimination would be eliminated root and branch. **Green v. County School Board of New Kent County,** 391 U.S. 430.

The Circuit Court of Appeals, Eighth Circuit, has made the school board's responsibility indelibly clear by referring to the language of the Supreme Court of the United States when it said:

> "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work **now.**
>
> "The obligation of the district courts, as it always has been, is to assess the **effectiveness** of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case." **Clark v. Board of Education of the Little Rock School District,** 426 F.2d 1035 (8 Cir. 1970).

Pursuant to the above direction, this Court, Henley, C.J., called on the school district to submit a "new plan" for the desegregation of the district's schools. In compliance with the Court's direction, the school district submitted a plan on June 8, 1971. Pursuant to a hearing on the school district's proposed plan and an alternative plan submitted by the school district by direction of the Court, an order was entered by the Court on July 16, 1971, pursuant to memorandum, approving the school board's plan with certain modifications proposing to desegregate the entire school system and convert to a unitary system in which racial discrimination would be completely eliminated. The school board's plan adopted by the Court required a drastic restructuring of the overall school system which called for the abandonment of the old 6-3-3 system and the substitution therefor of a 5-3-2-2 system. Grades 1-5 are considered as elementary grades; Grades 6-8 are considered as "middle grades";

Grades 9-10 are considered junior high school grades; and Grades 11-12 are considered senior high school grades. **Clark v. Board of Directors of Little Rock School Dist.**, 328 F.Supp. 1205 (1971).

This Court summarized the applicable law from recent decisions of the Supreme Court in its opinion at pages 1212-13 (328 F.Supp.), which is adopted herein by reference.

The Court ordered the plan to be implemented and put into effect as of the opening of the 1971-72 school year for all students at grade levels 6-12 with transportation of those students who desire. The Court ordered the elementary schools for all students at grade levels 1-5 to become completely effective as of the 1972-73 school year.

This Court's proposed plan employing a variety of techniques, including pairing, clustering, and contiguous and noncontiguous zoning to achieve the stated objective was reviewed by the Circuit Court of Appeals of the Eighth Circuit on appeal by the plaintiffs and cross-appeal by the defendants. In its per curiam opinion issued September 10, 1971, the appellate court affirmed the district court's plan insofar as it applies to the secondary schools as "constitutionally permissible" and well within the broad discretion of the district court to impose. **Clark v. Board of Education of Little Rock School Dist.**, 449 F.2d 493 (1971).

In affirming the district court's plan as to secondary schools, the appellate court stated: "All of the alternatives proposed by the Board of Education involved a one-race junior high school and, under the circumstances of this case, would have been constitutionally deficient." Page 496.

In its affirmance of the plan, the court stated its approval of proposed transportation as follows:

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"While many secondary school students will have to be transported at the board's expense under the approved plan, no showing was made at the District Court level or here that this burden will be unreasonable or that the students will be transported unreasonable distances. Furthermore, it is conceded by both parties that if a nonracial school system is to be achieved, there is no reasonable alternative to transporting many students."

The district court deferred the establishment of criteria for faculty and staff assignment until student assignment problems had been resolved. This action of the district court was found to be impermissible by our Circuit Court of Appeals. The appellate court set forth standards which the board of education must follow in reassigning teachers affected by the integration of the school system as had been included in the appellate court's opinion in **Moore v. Board of Education of Chidester School District No. 59,** 448 F.2d 709 (8 Cir. 1971).

In its partial remand, the appellate court directed that this Court require the board to include in a plan to be submitted as applicable to faculty and staff the objective nondiscriminatory standards as well as the established and previously announced nondiscriminatory subjective factors which will be used by the board in assigning teachers. The court stated at page 497, supra:

"It is not sufficient to say that an aggrieved teacher may bring an action after the fact to protect his rights. Such actions are disruptive, expensive, time-consuming and burdensome. Furthermore, staff members who are discriminated against or retained in some capacity may be reluctant to bring suit lest they further jeopardize their position."

The Circuit Court of Appeals went on to state, at page 498, that the district court correctly decided that the school

district was obligated to develop a unitary school system at the elementary level and to provide the transportation necessary to achieve that goal. The Circuit Court of Appeals again remanded the matter to the district court with the following instructions:

> "(1) to require the Board of Education to submit a plan for the establishment of a unitary system of elementary schools to the District Court no later than November 1, 1971;
>
> "(2) to require the Board of Education to implement the plan to the extent possible during the current school year and to fully implement the plan no later than the beginning of the 1972-73 school year;
>
> "(3) in the event the Board of Education's plan does not maximize the unitization of the elementary schools for the current term within fiscal and physical possibility, and the plan does not fully establish a unitary school system no later than the beginning of the 1972-73 school term, the court shall take such action as is necessary to achieve those objectives, including modifying the plan or devising alternatives thereto;
>
> "(4) to require the Board of Education to make the necessary provisions in the budget now being prepared for the 1972-73 school year for all costs incidental to the integration of the school system;
>
> "(5) to require the Board of Education to take immediate steps to arrange for the transportation necessary under the plan, and to make application for such state or federal funds as may be available for such purposes; and
>
> "(6) to require that in the interim between the District Court's approval of a plan for the operation of the schools for the 1972-73 school term and the beginning of that term, the Board of Education submit to the District Court every sixty days a report of its

progress toward the implementation of the approved plan."

This Court is under mandate to promptly consider the plan submitted by the Board of Education and to take every necessary action in regard thereto in order that the Little Rock schools fulfill the objective of the unitary school system no later than the beginning of the 1972-73 school year.

Pursuant to the mandate of the Eighth Circuit Court of Appeals, the Court promptly ordered the defendants to submit an additional plan that would include desegregation of the faculty and staff and those schools of the elementary grades 1-5. Pursuant thereto, the defendant school board submitted on November 1, 1971, its plan for the establishment of a unitary elementary school system and report of standards for teacher assignments. The proposed plan included measures which the school board would take to increase school integration at the elementary level during the remainder of the school year 1971-72 and a plan for achievement of a unitary system of elementary schools for the 1972-73 school year and subsequent school years, to be fully implemented by the commencement of the 1972-73 school term. The school board committed itself to making all preparations necessary for full implementation in the fall of 1972. Such preparations involve budgeting expense, acquisition of transportation facilities, applications for financial assistance in connection with district-provided transportation, scheduling of teacher assignments and reporting to this Court every sixty days. The Court concludes that the school board has complied with the interim requirements of the Circuit Court of Appeals in its remand insofar as necessary, expedient or possible.

A scheduled hearing by the Court was commenced on May 22, 1972, on the school district's proposed desegre-

gation plan of elementary grade levels 1-5 and standards to be governed as to the employment and assignment of teachers. At the conclusion of the hearing following the testimony of numerous witnesses and statements of counsel, the Court directed that briefs be filed to assist the Court in its analyses of the board's proposal to complete the desegregation of its school system to a fully integrated unitary system.

From the record of hearings, testimony of witnesses, exhibits and briefs of counsel, the Court proceeds first to a determination of the adequacy of the proposed plan submitted by the board for the establishment of a system of unitary schools beginning with the school year 1972-73 as to the elementary grades.

There are 26 elementary schools the school district proposes to utilize for the first five grades. They have been designated as ungraded primary schools for Grades 1, 2 and 3 and Grades 4 and 5 are designated as such. Two of the district's school facilities are to be phased-out or discontinued. These are Centennial and Pfeifer. Both elementary schools on being phased-out are to be annexed to other contiguous zones. Otherwise, the present zone lines for elementary schools are to remain fixed as of present geographic zones.

There are approximately 10,500 students within the district of these first five elementary grades which the school district proposes to assign to the 26 elementary schools. The ratio of these elementary five grades is approximately 55% white and 45% black.

Of the total number of students in the elementary grades the district proposes to provide transportation for approximately 2,000. No student in the ungraded primary, that is, in Grades 1, 2 and 3, will be provided transportation, except where the schools are paired and only then where students attending the paired schools are required

to attend a school building more than two miles from the student's residence. The district will provide transportation for all 4th and 5th grade students living more than two miles from the school to which the student is assigned.

The proposed plan by the school district establishes three general areas for the elementary schools. They are designated as Central City Elementary Schools, which include seven schools in the central area of the district, two on the eastern side and one on the western side; eastern elementary schools, formerly all-black schools generally, composed of eight of the district's schools.

The schools designated as the district's Central City Elementary Schools are: Forrest Park, Fair Park, Stephens, Franklin, Oakhurst, Garland, Kramer, Parham, Romine and Woodruff. Forrest Park, Fair Park and Franklin Schools will accommodate ungraded primary students. Stephens and Oakhurst will accommodate students of Grades 4 and 5. Neither of these schools will have a total assignment of black students of less than 35.3% or more than 46%. Five of these schools designated Central City Elementary Schools, Garland, Kramer, Parham, Romine and Woodruff will house students of all five grades. No school will have an assignment of less than 23% black or more than 60% black. These five schools are presently desegregated as to student assignment and under the proposed plan will not require disruption by changing of zones or assignment of students.

The concept of the district under the proposed plan is to establish a minimum degree of desegregation in excess of 20% for the minority versus the majority. The ten elementary schools listed above meet this objective with a minimum of rezoning or reassignment of students.

The Court concludes from the testimony, supported by numerous exhibits, that the district's plan of desegregation applicable to the above listed ten schools meets re-

quired constitutional standards and is permissible. No serious question is raised in the record including the testimony that these schools as proposed in the plan are not well within required constitutional standards. Under the authority and discretion of the Court this phase of the proposed plan will be approved.

For elementary Grades 4 and 5 the proposed plan of the school district would assign all students of Grade 4 in the eastern and western elementary schools to western school facilities to achieve required desegregation and all students of the 5th Grade in the eastern and western elementary schools are to be assigned to the eastern schools to achieve this objective. The plan calls for the school district to provide transportation for the 4th Grade students for the eastern elementary schools to the assigned schools in the western areas and 5th Grade students from the western elementary schools to the eastern schools.

The western elementary school buidings, that is, those buildings west of the Central City Elementary School's racially-balanced zones, which will house Grade 4 are McDermott, Terry, Jefferson, Williams, Brady, Wilson, Western Hills and Meadowcliff. No school housing Grade 4 would have a minority of black students of less than 31% or more than 50%.

Those elementary school buildings in the eastern sector, that is, east of the racially-balanced segregated Central City Schools, which will house Grade 5 students are: Carver, Gibbs, Rightsell, Washington, Gillam, Granite Mountain, Ish and Mitchell. No school will have assigned to it of the 5th Grade students wherein the minority, or black race, is less than 29.7% or more than 53.5%.

The Court concludes from the record, testimony of witnesses and exhibits that the part of the plan for assignment of 4th and 5th Grade students is constitutionally permissible and in the discretion of the Court should be

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approved as meeting required standards for an integrated and unitary school.

The proposed plan for the ungraded primary, that is, the 1st, 2nd and 3rd Grade elementary students in the eastern and western areas, would be assigned to their respective zones of the above listed schools in each area. It is admitted that under the plan these three elementary grades, designated as ungraded primary, will not be integrated. However, there will be assigned to each of these schools black and white students of the 4th and 5th Grades which would provide a minimum of 17% black students of the total number of students in the schools and a maximum of 82%.

The plaintiffs contend that within these first three primary grades the proposed plan fails to meet the constitutional requirements and, therefore, impermissible. The school district contends that inasmuch as each elementary school has a minimum of approximately 20% minority or majority of the total students assigned to the respective schools, the plan comes within the required standards and should be approved.

It is well established that intentional desegregation of classes to avoid integration cannot be permitted. **Jackson v. Marvell School Dist. No. 22**, 425 F.2d 211.

It appears that this is the first time this unique proposal has been proposed by a school district of all the plans heretofore considered by the courts. At least no case has been called to the attention of the Court by either party. In the broad discretion of the Court it should be considered on the basis of good-faith intention of the district, the justification as established by the testimony of witnesses, the exhibits, the reasoning between the school district's proposal, the effect it would have on the school district in its total operation as well as alternative proposals available for the Court's consideration.

The plaintiffs presented a very capable, knowledgeable and experienced witness on this vast and complicated subject of desegregation of schools as required by **Brown v. Board of Education I**, 347 U.S. 483, and **Brown v. Board of Education, II**, 349 U.S. 294. The witness, Dr. John A. Finger, Professor of Rhode Island College, was designated by the Court and developed the plan for the school district approved by the court in the **Swann et al. v. Charlotte-Mecklenburg Board of Education et al.**, 402 U.S. 1, case, decided by the United States Supreme Court, in which the court established guidelines not heretofore specifically set out by which school districts and district courts are to be governed in consideration of the question. Dr. Finger also participated in numerous other school district programs, including Oklahoma City, Oklahoma, and Winston-Salem, North Carolina. Although Dr. Finger had only brief opportunity of evaluating the problems of the Little Rock School District, and any alternative, he presented his own ideas as to the approach in all areas of the problem. Although he had no plan to suggest, he emphasized five specific areas that should be included in the consideration of any plan desegregating a school. These included:

(1) elimination of all-black schools as such;

(2) no requirement for specific ratio balance;

(3) question as to whether all schools must be included in the plan;

(4) stability of any plan on a long-term basis; and

(5) devising procedures equitable to both black and white students.

On the question of exclusion of certain grade levels as Grades 1, 2 and 3 in the instant case, he referred to it first as a legal problem, but more important as to the outcome or result of such exclusion in the overall good-

faith proposal of the school district. Although he was critical in some of his analyses of the proposed plan of the school district, it was his opinion that it could be made to work if redeveloped into a more desirable program.

The plaintiffs have proposed a plan which is included in the record and which would require drastic restructuring and tremendous responsibility in organizational requirements as well as economic burden. The expert witness, Dr. Finger, criticized the proposal for the same reason it was criticized by the school district's witness, Dr. Don R. Roberts, Assistant Superintendent for Personnel of the School District.

It appears there is some question as to whether the plaintiffs have offered an alternative plan since their proposal is filed as "Preliminary Suggestions for Elementary School Desegregation." The suggestions were severely criticized during the course of the hearings by witnesses for both the plaintiffs and the school district. Also the Court received the impression during the course of the hearing that the plaintiffs were not specially insistent on their suggestions being seriously considered by the Court.

There was inferences from the hearings that the best approach to the problem within these ungraded primary levels would be for the Court to seek the services of the plaintiffs' expert witness, Dr. Finger, for the purpose of developing an alternative plan for the school district such as was the experience in the **Charlotte-Mecklenburg** case. However, due to the time element to employ the services of someone completely outside of the area and unfamiliar with the local problems would obviously delay a decision and bring about an impossible task for the school board to make necessary plans for the commencement of the 1972-73 school year. Although the Court would have welcomed the expert advice of the plaintiffs' witness as to

some alternate proposal, further delay could not be justified due to necessity of arrangements for transportation, budgetary requirements, personnel, library and numerous other problems on which decisions for the new school year are required.

The "Preliminary Suggestions" as an alternative made by the plaintiffs appear to be based largely on extensive bussing of the students of these grade levels. For the ungraded primary students, referred to as elementary Grades 1, 2 and 3, it would require bussing of approximately 50% of the total number of students. For Grades 4 and 5 the alternative suggestion would require the bussing of more than 50% of the total number of students in these grades. Of the more than 10,000 in the elementary grades, the district would have the burden of transporting by bus more than 5,000 each day under the alternate suggestion of the plaintiffs. If transportation is required to this extent, the school district would of necessity spend more than 5% of its annual operating income for transportation of students to obtain a balanced ratio of both races in approximately every school facility of the district. It would also present what appears to be an impossible selection of students from various zones for assignment to other zones or distant schools. The plaintiffs' witness, Dr. Finger, explained that it was such a proposed movement of a student from one integrated school to another, which was deficient in the plaintiffs' proposal. The defendant's witness, Dr. Roberts, Assistant Superintendent of Schools, described the proposal as most serious in view of the financial impact upon the district's educational program as well as the adverse effect of transporting these small children to schools miles across the vast city from their home.

Since the plaintiffs' alternate suggestions appear to be most impracticable, the question for the Court is whether or not the district's plan for desegregating these elemen-

tary grades meet the requirement for a unitary school system under the mandate of the Circuit Court of Appeals.

The true test is whether or not any school in the district will remain racially identifiable. In this same proceeding, **Clark v. Little Rock School District,** 426 F.2d 1035 (1970), our Circuit Court of Appeals, En Banc, stated:

> "As in **Kemp III,** *supra* [423 F.2d 851] we do not hold that precise racial balance must be achieved in each of the several schools in the District in order for there to be a 'unitary system' within the meaning of the constitution. Nor do we hold that geographical zoning or the neighborhood school concept are in and of themselves either constitutionally required or forbidden." P. 1045.

In **Swann v. Board of Education,** 402 U. S. 1, 23, 24, Chief Justice Burger, for the Supreme Court, stated:

> "The District Judge went on to acknowledge that variation 'from the norm may be unavoidable'. This contains intimations that the 'norm' is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Also in **Clark v. Board of Education,** 426 F.2d 1035 (1970) Chief Judge Matthes, for our Circuit Court of Appeals, En Banc, stated:

"Lastly, we do not rule that busing is either required or forbidden. As Judge Blackmun stated in Kemp III, 'Busing is only one possible tool in the implementation of unitary schools. Busing may or may not be a useful factor in the required and forthcoming solution of the . . . problem which the District faces.' ... F.2d ... We observe in passing, however, that busing is not an alien practice in the State of Arkansas or this District. Some busing was employed by the District in the past to preserve segregated schools. * * * Of course, busing of school children is a common practice in many less urban areas of the state and is partially subsidized with state funds."

In **Swann**, supra, at p. 29, the United States Supreme Court stated:

"The scope of permissible transportation of students as an implement of a remedial degree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. * * *.

"The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, **Davis**, supra."

In an effort to comply with the above guidelines, the Court concludes that the proposed plan by the Board of Education of the Little Rock School District for desegregating elementary schools as required by mandate from the Circuit Court of Appeals should be approved with some modification.

In the first place, the school board is directed to modify its plan to provide that no elementary school shall have a

projected enrollment wherein the minority whether black or white constitutes less than 20% of the student population of the particular school. This may require some additional pairing in the case of elementary schools such as Western Hills. It may also require some slight modification of zones for the district's elementary school plan. The Court is mindful, however, that in **Yarbrough, et al. v. Hulbert-West Memphis School District No. 4, et al.**, 457 F.2d 333, it is permissible for one elementary school to be relaxed in meeting the norm or minimum limit beyond which no school will be permitted to fall.

In the second place, the school district shall modify the plan to provide an optional majority-to-minority. Such a transfer technique has long been recognized as a useful part of every desegregation plan. In **Swann**, supra, the court stated, at page 26:

> "Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation."
>
> However, "[I]n order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." **Swann**, supra, pgs. 26-27; Cf., **Ellis v. Board of Public Instruction**, 423 F.2d 203, 206 (CA5 1970).

Thirdly, the school board shall modify its proposed plan to assign faculty to the maximum extent practical whereby the elementary schools with a greater number of students of one race will have teachers of a greater number of the other race for that particular school.

Student transfers will not be required more often than each semester. If additional changes appear to be neces-

sary as may be revealed through reports and other information which may come to the attention of the Court, the Court will give consideration under its continuing jurisdiction.

Finally, the Court reaches the question of whether the Board's proposed plan for employment, assignment and dismissal of teachers meets the standards which must be following in reassigning teachers effected by the integration of the school system and the protection of faculty and staff members, including special services. See **Moore v. Chidester School District**, supra.

The Board of Education of the Little Rock School District and the Classroom Teachers Association, composed of teachers of the Little Rock Schools, have by negotiation entered into an agreement which provides, inter alia, employment of teachers in the Little Rock School System, renewal of contracts, retirement, teaching assignments and procedures for resolution of grievances. This includes evaluation of teachers, method of employment, and tenure on a nonracial-nondiscriminatory basis.

The Court concludes that the proposed plan meets the criteria under the rule established in **Moore v. Chidester School District**, supra, under the proposed plan and method of selection. It is the opinion of the Court that the school district has adopted a system in cooperation with the Classroom Teachers Association which employs objective nondiscriminatory standards as well as the established and previously nondiscriminatory subjective factors in the employment, assignment and dismissal of teachers.

In that all members of the faculty, including those engaged in special services, come within the established policy. The standards are applicable to all personnel so employed as members of the faculty. The plan obviously includes employment, assignment and dismissal of princi-

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pals of the various schools and such members of the faculty considered as administrative.

Although the Court concludes that the proposed negotiated agreement incorporates the standards as determined by the appellate court as applicable to faculty, it should be modified to include other staff personnel employed by the district. The school board is directed to make this modification in order that all personnel may be included as coming within the purview of the required standards. With this modification, the proposed plan in the opinion of the Court should be approved.

This opinion incorporates the findings and conclusions of the Court pursuant to Rule 52, Federal Rules of Civil Procedure.

An order will be entered in accordance with this opinion.

Dated: June 21, 1972

OREN HARRIS
United States District Judge

APPENDIX IV

In the United States District Court
Eastern District of Arkansas
Western Division

Delores Clark, et al.,
Plaintiffs,
v.
The Board of Education of the Little Rock School District, et al.,
Defendants.
No. LR 64-C-155

ORDER

(Filed July 25, 1972)

Now comes on for consideration motion of the defendants for an order staying that part of the order of this Court entered June 22, 1972, approving the Defendant School District's further plan of desegregation which requires transfer by the Defendant School District students in Grades 1 through 5 commencing with the 1972-73 school year and transportation to be provided for such transfer.

The basis of the Defendant School District for its motion for a stay pending appeal of the Court's order of June 22, 1972, is that the order comes within the provision of Section 803 of the recently enacted amendments to the Education Act of 1972.

Specifically, the Defendant School District contends that under the provision of the foregoing Act the effectiveness of the order of this Court of June 22, 1972, shall be post-

poned until all appeals in connection with the pleadings have been exhausted. Timely appeals to the Eighth Circuit Court of Appeals have been met by both plaintiffs and defendants with respect to the Court's order. Although this Court has great respect for wishes and policies expressed by the Congress of the United States, there appears to be a question as to whether or not the policy of the Congress will be applicable to this proceeding and a more serious question as to the jurisdiction of this Court in view of the status of this particular proceeding for desegregation as required by the Constitution of the United States in the operation of the Little Rock Schools.

The present order of this Court entered June 22, 1972, is supplemental to and a part of previous orders entered by this Court towards establishing of a unitary school system for the Little Rock School District. The Circuit Court of Appeals for the Eighth Circuit in its opinion passed on the question of transfers and requirements for transportation in 449 F.2d 496, 499. Pursuant thereto, and as required by this Court, the School District submitted its proposed plan for desegregation of its elementary schools on November 1, 1971. The order of this Court on June 22, 1972, after a full hearing approved the District's proposed plan with minor modification. The Court concludes and is of the opinion that the order of June 22, 1972, is an extension of and supplement to the prior order of this Court as approved in part by the Circuit Court of Appeals in its opinion of September 10, 1971. Although the Court is fully aware of the motive of Congress in its attempt to clarify the issue of "bussing" it appears that the proposed exhaustion of appeal is inapplicable to the constitutional questions upon which this Court's order of June 22, 1972, is based. The motion to stay should be denied.

It Is, Therefore, Considered, Ordered and Adjudged that the motion of the defendants for an order staying this Court's order of June 22, 1972, should be and the same is hereby denied.

Dated: July 24, 1972.

OREN HARRIS
United States District Judge